

Supreme Court, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-538**

RAYMOND GERALDO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To: *The Honorable Chief Justice, and the
Honorable Associates Justices of the
Supreme Court of the United States:*

The petitioner, Raymond Geraldo by Gordon Lang, his attorney, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Second Circuit upon the grounds set forth below.

It is respectfully suggested that the decision and opinion of the Court of Appeals in this case, Slip Op., May 11, 1977, pp. 3429-3435, is a grave departure from and is inconsistent with the decisions of this Court as herein set

forth. It is respectfully suggested that the decision of the Court of appeals fails to apply the decisions of this Court set forth in *Mooney v. Holohan*, 294 U.S. 103; *Miller v. Pate*, 386 U.S. 1 (1967); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); and *United States v. Agurs*, 427 U.S. 97 (1976).

The petitioner was indicted, tried and convicted upon false evidence and perjured testimony known to be such by the government in violation of petitioner's Constitutional rights under the Fifth and Sixth Amendments.

The Court of appeals decision in this case, contravenes the Sixth Amendment, Rule 7, Fed. Rules Cr. Proc. 28 U.S.C. and the decisions of this Court and is in conflict with its own prior decisions and with the decisions of the Courts of Appeals of the other circuits, which require that an indictment must allege a "plain, concise and definite written statement of the essential facts constituting the offense charged . . ."

The decision of the Court of Appeals in this case has created a precedent that a court may construe the words of an indictment so as to find a covert and esoteric meaning therefor which fundamentally changes the facts alleged in the indictment and which fundamentally changes the theory of the indictment.

The decision of the Court of Appeals held that the words "*signed by . . . Rodriguez*", and the words, *bearing the signature of . . . Rodriguez*" had a covert, esoteric and fundamentally different meaning from each other, notwithstanding that those two sets of words were words of common understanding which have meant the same thing from time immemorial, as set forth at pp. 31-34. Petition of Manuel Alfonso Rodriguez.

By that decision the Court of Appeals affirmed a judgment of conviction based on false evidence and perjured testimony.

**STATEMENT PURSUANT TO U.S. SUPREME
COURT RULE 23, 28 U.S.C.A.**

The opinion delivered by the United States Court of Appeals for the Second Circuit in this case on May 11, 1977 was not officially reported. The copy of the opinion is set out in Appendix, pp. 1a-7a.

Jurisdiction of this Court is invoked on the ground that the judgment in question was based on an indictment returned against the petitioner in the United States District Court for the Southern District of New York which charged violations of federal criminal law, to wit: 18 U.S.C. 371, 18 U.S.C. Section 1001, and 18 U.S.C. Section 2.

The judgment of the Court of Appeals which is sought to be reviewed is dated May 11, 1977 and was entered May 11, 1977.

The order of the Court of Appeals denying the petitioner's application for rehearing is dated August 30, 1977 and was entered August 30, 1977.

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. Section 1254(1).

The questions presented for review are as follows:

(1) Was the petitioner denied his Constitutional rights under the Fifth Amendment to due process of law and to a fair trial when the government obtained his conviction under the indictment which charged him with conspiracy to file false documents with the United States Department of State and with the substantive count of filing on May 5, 1976 a false document with the said Department of State "bearing the signature of the defendant Manuel Alfonso Rodriguez", which signature was the only connection between petitioner Rodriguez and the crime charged, when in fact the government knew at the time of the

indictment that Miguel D. Celis (who had testified to the Grand Jury for the government) had forged the signature of Manuel Alfonso Rodriguez on that document and the government admitted to the Court of Appeals its said knowledge?

(2) Was the petitioner denied his Constitutional rights under the Fifth Amendment to due process of law and to a fair trial when the government wilfully and deliberately suppressed and concealed from the petitioner, his counsel, the Court, and jury, the fundamental and essential exculpatory evidence that Miguel D. Celis had forged the signature of Manuel Alfonso Rodriguez on the document dated April 22, 1976 which was filed on May 5, 1976 with the Department of State and which was the corpus of the crimes charged in Count 3, and an essential element of the crime charged in Count 1 of the indictment?

(3) Was the petitioner denied his Constitutional rights under the Fifth Amendment to due process of law when the government presented false evidence to the Grand Jury that the aforesaid document dated April 22, 1976 was a document "bearing the signature of defendant Manuel Alfonso Rodriguez", when in fact the government knew that Miguel D. Celis had forged the signature of Manuel Alfonso Rodriguez thereon?

(4) Was the conviction of the petitioner obtained without sufficient evidence?

(5) Was the trial court's charge as to reasonable doubt reversible error?

(6) Did the trial court charge which include an instruction that the jury could convict petitioner if it found that he had "facilitated" the commission of the substantive crime charged in Count 3 of the indictment which is not an element of the statute in

question, 18 U.S.C. Section 1001, deny Rodriguez a fair trial and was it reversible error?

(7) Did the prosecutor's statements to the jury deprive the petitioner of a fair trial and require reversal of the judgment of conviction?

(8) Was it reversible error to allow the government to introduce a "Bushmaster" machine gun in evidence which had no relevance to the indictment, and which was the prototype sample sub-machine gun in existence, no other such sub-machine guns having been manufactured, and whose real purpose was to create unfair prejudice against the petitioner?

(9) Was the petitioner denied his Constitutional rights under the Fifth and Sixth Amendments by the decision of the Court of Appeals that the government intended that the allegations set forth in Count 3 of the indictment, to wit, "bearing the signature of defendant Manuel Alfonso Rodriguez" meant "that Rodriguez' name on the certificate was there with his full knowledge and consent, but not as a result of his penmanship," when the words of the indictment made no such allegations of fact, when there was *no evidence* whatever presented at trial from any source that "Rodriguez' name on the certificate was there with his full knowledge and consent", and when it was found by the Court of Appeals that the petitioner did not sign that certificate and when it was established before the Court of Appeals that to the knowledge of the government, existing prior to the return of the indictment, that Miguel D. Celis had forged the signature of petitioner on the certificate dated April 22, 1976, which is the subject of Count 3, which decision by the Court of Appeals fundamentally changed the essential facts alleged

against the petitioner and upon which the petitioner was charged, tried and convicted?

(10) Was the petitioner denied his Constitutional rights under the Fifth and Sixth Amendments when the Government introduced hearsay testimony by government agent Kelly alleging that Miguel Celis told him that Manuel Alfonso Rodriguez had signed three (3) blank letterhead sheets of paper, one of which was later filled in by Miguel D. Celis and others and filed with the Department of State, and was the basis for Count 3 of the indictment, when the Government introduced tape recordings by Miguel D. Celis, in which Celis states that Rodriguez signed the said three (3) blank letterhead sheets of paper, and numerous other hearsay, double hearsay, and triple hearsay testimony as to what others said about Rodriguez, when Miguel D. Celis did not testify, and none of the other hearsay declarants testified, and none were subject to cross-examination?

The Constitutional provisions involved in this case are:

(a) *Fifth Amendment*: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."
" U.S.C.A. Const. Amend. 5.

(b) *Sixth Amendment*: "In all criminal prosecutions, the accused shall enjoy the right . . .

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the assistance of Counsel for his defense." U.S.C.A. Const. Amend. 6.

(c) *Fourth Amendment*: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Statutes involved in this case are:

(a) *18 U.S.C. Section 2*: "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

(b) *18 U.S.C. Section 371*: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum provided for such misdemeanor."

(c) *18 U.S.C. Section 1001*: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years or both."

The Federal Rules of Criminal Procedure involved in this case are:

(a) Fed. Rules Cr. Proc., Rule 7, 28 U.S.C.A.:
"(c) Nature and Contents. The Indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged . . . "

INDICTMENT

"1. At all times material to this Indictment, the defendant, Dominick F. Cagianese, was an American citizen employed as the Director of Aeronautics, Mott Haven Industries, Ltd., 439 Bruckner Boulevard, Bronx, New York.

2. At all times material to this Indictment, the defendant, Frank G. Alvarez, was an American citizen employed by Mott Haven Industries, Ltd., 429 Bruckner Boulevard, Bronx, New York, as its Marketing Director for Latin America.

3. At all times material to this Indictment, the defendant, Irwin Tobogman, was an American citizen and self-employed businessman conducting

his business affairs from his residence located at 415 East 52 Street, New York, New York.

4. At all times material to this Indictment, the defendant, Raymond Geraldo, was a self-employed businessman and an American citizen.

5. At all times material to this Indictment, the defendant, Robert Michaelson, was an American citizen employed as the President of Wittington Imports, Ltd., Great Neck, New York.

6. At all times material to this Indictment, the defendant, Miguel D. Celis, was a self-employed businessman residing in San Salvador, El Salvador, Central America and was a citizen of that country.

7. At all times material to this Indictment, the defendant, Manuel Alfonso Rodriguez, was the Chief of Staff of the Armed Forces of El Salvador, Central America, and a citizen of that country.

COUNT ONE

The Grand Jury charges:

I. The Conspiracy

8. From on or about January 1, 1976 and continuously thereafter up to and including May 15, 1976, in the Southern District of New York and elsewhere, Dominick Cagianese, Frank G. Alvarez, Irwin Tobogman, Robert Michaelson, Raymond Geraldo, Miguel D. Celis and Manuel Alfonso Rodriguez, the defendants, Howard Peters named herein as an unindicted co-conspirator but not as a defense, and others to the Grand Jury unknown, unlawfully, willfully and knowingly did combine, conspire, confederate and agree together

and with each other to commit certain offenses against the United States, to wit, violations of Title 26, United States Code, Sections 5811, 5812, 5861(d) and (e) (Title II of the Gun Control Act of 1968) and of Title 18, United States Code, Sections 1001 and 2.

II. Objectives of the Conspiracy

9. The objective of the conspiracy was to secretly sell weapons, munitions and other implements of war to buyers in the United States in a manner designed and intended to conceal from the United States Department of State and the United States Department of the Treasury the true identities of the buyers.

10. In order to attain their objective, the members of the conspiracy also agreed to seek to prepare and file with the United States Department of State certain false and fraudulent documents intended to create the false and misleading appearance that certain weapons and munitions were to be purchased by foreign countries for the exclusive use of their armed forces in their national defense.

III. Means of the Conspiracy

11. Among the means by which the defendants would and did carry out the said conspiracy were the following:

- (a) Between, on or about March 20, 1976 and May 15, 1976, the defendants prepared, facilitated the preparation of, and caused to be prepared certain false and fraudulent documents including:
 - (i) an official United States Department of State

Form DSP-5, entitled "Application/License for Permanent Export of Unclassified Implements of War . . ."; (ii) a certificate, dated April 22, 1976, bearing the signature of the defendant Colonel Manuel Alfonso Rodriguez; (iii) a copy of a purchase order for 10,000 submachine guns and 1.5 million rounds of ammunition, dated May 3, 1976, signed by Howard Peters as purchasing agent on behalf of San Pan Trading Corporation; and (iv) a United States Department of State, Office of Munitions Control, Form DSP-83, entitled "Consignee Purchaser Transaction Statement" signed by the defendant Colonel Manuel Alfonso Rodriguez and bearing his official government seal.

(b) On or about May 5, 1976, the defendants filed, facilitated the filing of, and caused to be filed with the United States Department of State the false and fraudulent documents referred to in Subparagraphs 11(a)(i), and (iii) above.

Overt Acts

In furtherance of said conspiracy and in order to accomplish its objectives, the defendants committed the following overt acts, among others in the Southern District of New York and elsewhere:

1. On or about March 20, 1976 the defendant Robert Michaelson travelled to the Pepper Tree Restaurant, Mt. Kisco, New York in order to meet and negotiate with prospective buyers of weapons, munitions and other implements of war.

2. On or about March 21, 1976 the defendant Raymond Geraldo travelled to the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning the sale of certain

weapons, munitions and other implements of war.

3. On or about March 22, 1977 the defendants Dominick Caglianese and Raymond Geraldo met at the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning arrangements to obtain from an official of a foreign government false and fraudulent documents to be filed with the United States Department of State.

4. On or about March 27, 1976, March 29, 1976 and April 14, 1976, at the Pepper Tree Restaurant, Mt. Kisco, New York, the defendants Dominick Cagianese, Frank G. Alvarez, Raymond Geraldo and Robert Michaelson had conversations concerning an initial sale of 10,000 submachine guns for a price of \$2,800,000.

5. On or about April 1, 1976, the defendant Dominick Cagianese travelled to the vicinity of Winston-Salem, North Carolina in order to observe and participate in a test firing demonstration of a "Bushmaster" submachine gun.

6. In or about April 1976, the defendant Raymond Geraldo travelled to Central America for the purpose of obtaining a false and fraudulent certificate from an official of a Central American country.

7. On or about May 2, 1976, the defendants Raymond Geraldo, Robert Michaelson, Dominick Cagianese and Miguel D. Celis met at the Pepper Tree Restaurant, Mt. Kisco, New York, and had a conversation concerning a cash payment to be made to the defendant Manuel Alfonso Rodriguez in return for the defendant Rodriguez facilitating the filing of false and fraudulent documents with the United States Department of State.

8. On or about May 3, 1976 the defendants

Frank G. Alvarez, Miguel D. Celis and Raymond Geraldo met at the offices of Mott Haven Industries, Ltd., 429 Bruckner Blvd., Bronx, New York and had a conversation concerning the preparation of false and fraudulent documents to be filed with the United States Department of State.

9. On or about May 4, 1976, the defendants Frank G. Alvarez, Miguel D. Celis and Raymond Geraldo met at the offices of Mott Haven Industries, Ltd., 429 Bruckner Blvd., Bronx, New York, and had a further conversation concerning arrangements to file certain false and fraudulent documents with the United States Department of State.

10. On or about May 5, 1976 the defendant Frank G. Alvarez directed one of his employees to deliver certain false and fraudulent documents to the United States Department of State, Washington, D.C.

11. On or about May 14, 1976 the defendant Frank G. Alvarez placed a telephone call from the offices of Mott Haven Industries, Ltd. to El Salvador, Central America.

12. On or about May 14, 1976, the defendant Frank G. Alvarez placed a telephone call from the offices of Mott Haven Industries, Ltd., to the United States Department of State, Washington, D.C.

13. On or about May 15, 1976, the defendants Manuel Alfonso Rodriguez, Miguel D. Celis, Raymond Geraldo, Irwin Tobogman, Robert Michaelson and Frank G. Alvarez met at the Holiday Inn, Mt. Kisco, New York and discussed their plan to sell weapons, munitions and other implements of war to buyers in the United States.

14. On or about May 15, 1976, at the Holiday Inn, Mt. Kisco, New York, the defendants Manuel Alfonso Rodriguez and Miguel D. Celis received the approximate sum of \$75,000 in cash for having provided, and having agreed to provide certain false and fraudulent documents filed and to be filed with the United States Department of State.

15. On or about May 15, 1976, at the Holiday Inn, Mt. Kisco, New York, the defendants Robert Michaelson and Irwin Tobogman received the approximate sum of \$25,000 in cash for having facilitated the preparation of false and fraudulent documents filed and to be filed with the United States Department of State. (Title 18, United States Code, Section 371).

COUNT TWO

The Grand Jury further charges:

On or about May 5, 1976, in the Southern District of New York and elsewhere, Dominick Cagianese, Frank G. Alvarez, Irwin Tobogman, Robert Michaelson, Raymond Geraldo, Miguel D. Celis, and Manuel Alfonso Rodriguez, the defendants, in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State, unlawfully, wilfully and knowingly did make, facilitate the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a United States Department of State Form DSP-5, entitled, "Application/License for Permanent Export of Unclassified Implements of War . . . " that 10,000 "Bushmaster" sub-machine guns having an approximate value of

\$2,550,000 together with 1.5 million rounds of ammunition for the said submachine guns were to be exported to the nation of El Salvador, Central America for use in El Salvador's national defense, whereas, in truth and in fact, the defendants then and there well knew that the said 10,000 "Bushmaster" submachine guns were to be sold to individuals in the United States at a price of approximately \$2,800,000 and further that the 1.5 million rounds of ammunition were to be sold to the same individuals in the United States.

(Title 18, United States Code, Sections 1001 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about May 5, 1976, in the Southern District of New York and elsewhere, Dominick Cagianese, Frank G. Alvarez, Irwin Tobogman, Robert Michaelson, Raymond Geraldo, Miguel D. Celis, and Manuel Alfonso Rodriguez, the defendants, in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State, unlawfully, willfully and knowingly did make, facilitate, the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a certificate dated April 22, 1976 on the official letterhead of the "Estado Mayor General De La Fuerza Armada, San Salvador, El Salvador, C.A.", bearing the signature of the defendant Manuel Alfonso Rodriguez, that 10,000 "Bushmaster" submachine guns and 1.5 million rounds of ammunition for

said submachine guns were to be sold by the armed forces of El Salvador and would not be re-exported to any third party whereas, in truth and in fact, the defendants then and there well knew that the said 10,000 "Bushmaster" submachine guns and the 1.5 million rounds of ammunition were to be sold to individuals in the United States.

(Title 18, United States Code, Sections 1001 and 2.)"

COUNT FOUR

The Grand Jury further charges:

On or about May 5, 1976, in the Southern District of New York and elsewhere, Dominick Cagianese, Frank G. Alvarez, Irwin Tobogman, Robert Michaelson, Raymond Geraldo, Miguel D. Celis, and Manuel Alfonso Rodriguez, the defendants, in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State, unlawfully, willfully and knowingly did make, facilitate the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a purchase order, dated May 3, 1976, from San Pan Trading Corporation, 3 Wren Drive, Woodbury, New York, to Mott Haven Industries, Ltd., 429 Bruckner Boulevard, Bronx, New York, that 10,000 machine guns at a price of \$245 each together with 1.5 million rounds of ammunition were to be exported to El Salvador, Central America, whereas, in truth and in fact, the defendants then and there well knew that the 10,000 machine guns were to be sold to individuals in the United States for approximately \$2,300,000

and further that the 1.5 million rounds of ammunition were to be sold to the same individuals in the United States.

(Title 18, United States Code, Sections 1001 and 2.)

/s/

FOREMAN

/s/ Robert B. Fiske, Jr.

United States Attorney

STATEMENT OF THE CASE AND FACTS

Trial was held before District Judge Kevin T. Duffy and a jury on September 20, 21, 23, 24, 27-30, October 1, 5, 8, 1976.

The petitioner is presently confined in jail at Maxwell Correctional Facility, Montgomery, Alabama.

Reference is respectfully made for all purposes to the petition for certiorari filed in this Court by Manuel Alfonso Rodriguez, which petition (and appendix) is respectfully incorporated by reference herein.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Dated as of:

September 29, 1977